



Migration Amendment (Complementary Protection) Act 2011

No. 121, 2011

An Act to amend the *Migration Act 1958*, and for related purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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No. 121, 2011

An Act to amend the *Migration Act 1958*, and for related purposes

[Assented to 14 October 2011]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Migration Amendment (Complementary Protection) Act 2011*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information | | |
|---|---|------------------------------------|
| Column 1 | Column 2 | Column 3 |
| Provision(s) | Commencement | Date/Details |
| 1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table | The day this Act receives the Royal Assent. | 14 October 2011 |
| 2. Schedule 1, items 1 to 17 | A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period. | 24 March 2012 (see F2012L00650) |
| 3. Schedule 1, item 18 | Immediately after the commencement of the provision(s) covered by table item 2. | 24 March 2012 |
| 4. Schedule 1, items 19 and 20 | At the same time as the provision(s) covered by table item 2. | 24 March 2012 |
| 5. Schedule 1, item 21 | Immediately after the commencement of the provision(s) covered by table item 2. | 24 March 2012 |
| 6. Schedule 1, items 22 to 35 | At the same time as the provision(s) covered by table item 2. | 24 March 2012 |

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule

concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Migration Act 1958

1 Subsection 5(1)

Insert:

Covenant means the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2 to the *Australian Human Rights Commission Act 1986*.

2 Subsection 5(1)

Insert:

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

3 Subsection 5(1)

Insert:

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful

sanctions that are not inconsistent with the Articles of the Covenant.

4 Subsection 5(1)

Insert:

non-political crime:

- (a) subject to paragraph (b), means a crime where a person's motives for committing the crime were wholly or mainly non-political in nature; and
- (b) includes an offence that, under paragraph (a), (b), (c) or (d) of the definition of ***political offence*** in section 5 of the *Extradition Act 1988*, is not a political offence in relation to a country for the purposes of that Act.

5 Subsection 5(1)

Insert:

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national; or
 - (b) if the non-citizen has no country of nationality—the country of which the non-citizen is an habitual resident;
- to be determined solely by reference to the law of the relevant country.

6 Subsection 5(1)

Insert:

serious Australian offence means an offence against a law in force in Australia, where:

- (a) the offence:
 - (i) involves violence against a person; or
 - (ii) is a serious drug offence; or
 - (iii) involves serious damage to property; or
 - (iv) is an offence against section 197A or 197B (offences relating to immigration detention); and
- (b) the offence is punishable by:
 - (i) imprisonment for life; or
 - (ii) imprisonment for a fixed term of not less than 3 years;or

- (iii) imprisonment for a maximum term of not less than 3 years.

7 Subsection 5(1)

Insert:

serious foreign offence means an offence against a law in force in a foreign country, where:

- (a) the offence:
 - (i) involves violence against a person; or
 - (ii) is a serious drug offence; or
 - (iii) involves serious damage to property; and
- (b) if it were assumed that the act or omission constituting the offence had taken place in the Australian Capital Territory, the act or omission would have constituted an offence (the *Territory offence*) against a law in force in that Territory, and the Territory offence would have been punishable by:
 - (i) imprisonment for life; or
 - (ii) imprisonment for a fixed term of not less than 3 years; or
 - (iii) imprisonment for a maximum term of not less than 3 years.

8 Subsection 5(1)

Insert:

significant harm means harm of a kind mentioned in subsection 36(2A).

9 Subsection 5(1)

Insert:

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or

-
- (c) for the purpose of intimidating or coercing the person or a third person; or
 - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
 - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

10 At the end of subparagraph 5A(3)(j)(ii)

Add “or”.

11 After subparagraph 5A(3)(j)(ii)

Insert:

- (iii) an offshore entry person who makes a claim for protection on the basis that the person will suffer significant harm;

12 After paragraph 36(2)(a)

Insert:

- (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

13 At the end of subsection 36(2)

Add:

- ; or (c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa.

14 After subsection 36(2)

Insert:

- (2A) A non-citizen will suffer *significant harm* if:
- (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.
- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

Ineligibility for grant of a protection visa

- (2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:
- (a) the Minister has serious reasons for considering that:
 - (i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
 - (ii) the non-citizen committed a serious non-political crime before entering Australia; or
 - (iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or
 - (b) the Minister considers, on reasonable grounds, that:
 - (i) the non-citizen is a danger to Australia's security; or
 - (ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious

Australian offence or serious foreign offence), is a danger to the Australian community.

15 Subsections 36(4) and (5)

Repeal the subsections, substitute:

- (4) However, subsection (3) does not apply in relation to a country in respect of which:
 - (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
- (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
 - (a) the country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
- (5A) Also, subsection (3) does not apply in relation to a country if:
 - (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
 - (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

16 Subsection 48A(2) (paragraphs (aa) and (ab) of the definition of *application for a protection visa*)

Repeal the paragraphs, substitute:

- (aa) an application for a visa, a criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c); and

17 Subparagraph 91N(3)(a)(i)

Omit “asylum”, substitute “protection”.

18 Subsection 91T(1)

Omit “(1)”.

19 Subsection 91T(1)

Omit all the words after “were a reference to”, substitute “a non-political crime within the meaning of this Act”.

20 Subsections 91T(2) and (3)

Repeal the subsections.

21 Subsection 91U(1)

Omit “(1)”.

22 Paragraph 91U(1)(a)

Omit “(as defined by subsection (2))”.

23 Paragraph 91U(1)(b)

Omit “(as defined by subsection (3))”.

24 Subsections 91U(2) and (3)

Repeal the subsections.

25 Subparagraph 336F(3)(a)(ii)

Omit “Refugees Protocol; and”, substitute “Refugees Protocol; or”.

26 At the end of paragraph 336F(3)(a)

Add:

- (iii) an offshore entry person who makes a claim for protection on the basis that the person will suffer significant harm; and

27 Subparagraph 336F(4)(a)(ii)

Omit “Refugees Protocol; and”, substitute “Refugees Protocol; or”.

28 At the end of paragraph 336F(4)(a)

Add:

-
- (iii) an offshore entry person who makes a claim for protection on the basis that the person will suffer significant harm; and

29 At the end of paragraph 336F(5)(c)

Add “or”.

30 After paragraph 336F(5)(c)

Insert:

- (ca) the person is an offshore entry person:
 - (i) who makes a claim for protection on the basis that the person will suffer significant harm; and
 - (ii) who, following assessment of his or her claim, is found not to be a person for whom there is a real risk of suffering significant harm; or
- (cb) the person is an offshore entry person:
 - (i) who makes a claim for protection on the basis that the person will suffer significant harm; and
 - (ii) who, following assessment of his or her claim, is found to be a person in respect of whom there are serious reasons for considering that he or she has committed a crime against peace, a war crime or a crime against humanity (as defined by international instruments prescribed by the regulations) or a serious non-political crime before entering Australia, or that he or she has been guilty of acts contrary to the purposes and principles of the United Nations; or
- (cc) the person is an offshore entry person:
 - (i) who makes a claim for protection on the basis that the person will suffer significant harm; and
 - (ii) who, following assessment of his or her claim, is found to be a person in respect of whom there are reasonable grounds for considering that he or she is a danger to Australia’s security or is a person who, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community;

31 At the end of paragraph 411(1)(c)

Add “ (other than a decision that was made relying on paragraph 36(2C)(a) or (b))”.

32 At the end of paragraph 411(1)(d)

Add “ (other than a decision that was made because of paragraph 36(2C)(a) or (b))”.

33 Paragraph 500(1)(c)

Repeal the paragraph, substitute:

- (c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
 - (i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or
 - (ii) paragraph 36(2C)(a) or (b) of this Act;

34 Paragraph 500(4)(c)

Repeal the paragraph, substitute:

- (c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
 - (i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or
 - (ii) paragraph 36(2C)(a) or (b) of this Act.

35 Application

The amendments made by this Schedule apply in relation to an application for a protection visa (within the meaning of the *Migration Act 1958*):

- (a) that is made on or after the day on which this item commences; or
- (b) that is not finally determined (within the meaning of subsection 5(9) of that Act) before the day on which this item commences.

*[Minister's second reading speech made in—
House of Representatives on 24 February 2011
Senate on 14 June 2011]*

(25/11)

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